AMODA SDN BHD

v.

LUXURY HOME CONCEPT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-108-1999]
31 MAY 2000

CIVIL PROCEDURE: *Summary judgment - Application for - Breach of tenancy agreement - Defendant/tenant vacated premises before expiry of fixed term - Whether plaintiff/landlord could claim rentals for remaining period - Oral representations made by plaintiff - Whether defendant induced to enter into tenancy agreement - Evidence Act 1950, prov. (b) s. 92 - Continuous and persistent deterioration in defendant's business - Whether defendant compelled to vacate premises to reduce losses - Triable issues - Whether application for summary judgment should be granted - Rules of the High Court 1980, O. 14*

Pursuant to a tenancy agreement, the defendant agreed to rent the premises of the plaintiff for a fixed term of three years. In breach of the tenancy agreement, the defendant vacated the premises before the expiration of the three years. The plaintiff claimed that the defendant was liable to pay the rentals for the unexpired term. The plaintiff sought to obtain summary judgment against the defendant under O. 14 of the Rules of the High Court 1980. The Senior Assistant Registrar ('SAR') dismissed the application and gave the defendant an unconditional leave to defend. Hence, instant appeal by the plaintiff.

The defendant claimed that it vacated the premises prematurely due to the continuous and persistent deterioration in its business during the period of its occupation. Further, the defendant claimed that it was induced to enter into the tenancy agreement based on oral representations made by the plaintiff.

Held:

[1] When a document in writing does not contain the entire agreement but embodies only some of the conditions, oral evidence to prove some other terms agreed upon and not inconsistent with the written instrument is clearly admissible.

[1a] The phrase "separate oral agreement" in s. 92(b) of the Evidence Act 1950 refers to contemporaneous or prior oral agreement. Proviso (b) requires: (i) that the separate agreement should relate to any matter on which the document is silent; and (ii) that it is not inconsistent with its terms.

[2] The oral representations by the plaintiff should be admitted as it clearly showed that the defendant was induced to enter into the tenancy agreement. The admission of the extrinsic evidence by way of oral representations were not inconsistent with the main terms of the tenancy agreement and accordingly it fell squarely within the ambit and purview of proviso (b) to s. 92 of the Evidence Act 1950.

[3] The oral representations made by the plaintiff would certainly bar the plaintiff from obtaining summary judgment against the defendant. The said representations could only be determined by *viva voce* evidence at the trial of the action. Further, they established beyond per adventure that there was a *bona fide* triable issue that ought to be determined not by way of affidavit evidence but rather by way of a trial where the assessment of the credibility of the witnesses would be seen and heard in open court.

[4] The SAR rightly gave the defendant an unconditional leave to defend. Where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence, the defendant ought to be given leave to defend. Also, the counterclaim advanced by the defendant should entitle the defendant to be given an unconditional leave to defend. That counterclaim arose out of the same subject matter of the action and should be adjudicated in open court.

[Appeal dismissed.]

Case(s) referred to:

Arrale v. Costain Civil Engineer [1976] 1 Lloyd's Rep 98 ***(refd)***
Balaram v. Ramesh A [1973] Or 13 ***(refd)***
Bankes v. Jarvis [1903] 1 KB 549 ***(refd)***
Brij Krishore v. Lakhan A 1978 A 314 ***(refd)***
Crawford v. Gilmore 30 LR Ir 238 ***(refd)***
Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd [1965] 2 All ER 65 ***(refd)***
Electric & General Contract Corporation v. Thomson-Houston, etc, Co 10 TLR 103 ***(refd)***
Esso Petroleum Co. Ltd v. Mardon [1976] 1 QB 801 ***(refd)***
Eushun Properties Sdn Bhd & Ors v. MBf Finance Bhd (formerly known as Malaysia Borneo Finance Corpn (M) Bhd) [1992] 3 CLJ 1519 ***(refd)***
Ganesan & Anor v. Baskaran [1986] 2 MLJ 26 ***(refd)***
Hanak v. Green [1958] 2 QB 9 ***(refd)***
Heilbut, Symons & Co v. Buckleton [1913] AC 30 ***(refd)***
Ho Shee Jan v. Hadayat Harta Holdings Sdn Bhd [1989] 1 MLJ 33 ***(refd)***
Ironclad, etc, Co v. Gardner 4 TLR 18 ***(refd)***
Kim Seng Hotel And Coffee Shop v. Chuah Teong Buan [1971] 1 MLJ 233 ***(refd)***
Kunja Behari v. Raman 41 CWN 1953 ***(refd)***

Lakshminarasimha v. Raghavamma A 1936 M 380 ***(refd)***
Lindley v. Lacey 34 LJCP ***(refd)***
Mann v. Mann 43 LJCP 241 ***(refd)***
ML Samuel v. Bhadur Singh [1938] MLJ 173 ***(refd)***
Morgan & Son Ltd v. S Martin Johnson & Co [1949] 1 KB 107 ***(refd)***
Morgan v. Griffith LR 6 Ex 71 ***(refd)***
Nagendra Nandini Dasi v. Bhola Nath Khamaru 65 CLJ 225 ***(refd)***
Pearson v. Pearson 54 LJ Ch 37 ***(refd)***
Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York [1998] 1 CLJ 424 ***(refd)***
Saudamini v. Spalding 12 CLR 163 ***(refd)***
Saw v. Hakim 5 TLR 72 ***(refd)***
Ray v. Barker 4 Ex D 279 ***(refd)***
Sigma Cable Co Ltd v. Nam Huat Electric & Sanitary Co and Ors [1972] 1 MLJ 7 ***(refd)***
Tan Chong & Sons Motor Company (Sdn) Berhad v. Alan McKnight [1983] 1 MLJ 220 ***(refd)***
Tan Swee Hoe Co Ltd v. Ali Hussain Bros [1980] 2 MLJ 16 ***(refd)***
Teh Wan Sang & Sons Sdn Bhd v. See Teow Chuan [1984] 1 MLJ 130 ***(refd)***
The 'Karen Olthmann' [1976] 2 Lloyd's Rep 708 ***(refd)***
Ward v. Plumbley 5 TLR 198 ***(refd)***
Ward v. Plumbley 6 TLR 198 ***(refd)***
Yorkshire Banking Co. v. Beatson 4 CPD 213 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 92(b)
Rules of the High Court 1980, O. 14

Other source(s) referred to:
Evidence, Phipson, 1990, 14 edn, p 1011, para 37-01

For the plaintiff - Francis I Brigged; M/s Francis Brigged
For the defendant - Loo Chea Chin; M/s CK Tan & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Facts

By a tenancy agreement dated 9 January 1997 the defendant agreed to rent 5,479 square feet of floor space at mezzanine floor, AMODA building, number 22, Jalan Imbi, Kuala Lumpur belonging to the plaintiff (hereinafter referred to as the "premises") for a period of three years commencing from 1 January 1997 and expiring on 31 December 1999 at a monthly rental of RM20,820 with monthly service charge of RM6,574.80 – both sums totalling

RM27,394 excluding electricity and additional air conditioning charges. That tenancy agreement was for a fixed term of three (3) years and it was expressly agreed by the parties under s. 8.02(e) of the tenancy agreement that in the event the defendant vacated from the premises before the expiration of the fixed term of three years, the defendant shall forthwith pay to the plaintiff a sum equivalent to the prevailing rent for the whole of the unexpired period of the term of the tenancy agreement as agreed liquidated damages.

In breach of that tenancy agreement, the defendant without notice to the plaintiff vacated from the premises on or before 31 January 1998 and it was said that the defendant was thus liable to pay the rentals for the unexpired term of twenty-three months from 1 February 1998 until 31 December 1999. It was said that when the defendant vacated the rented premises without notice to the plaintiff, the latter then proceeded to utilise the rentals and the service charge deposits paid by the defendant at the time of execution of the tenancy agreement as part payment of the rental and service charges for the period beginning from January to March 1998. It was averred that by reason of the defendant's breach of the tenancy agreement, the defendant was liable to pay the plaintiff the damages as itemised and particularised hereinunder:

Months	**Expenses**	**Amounts**
January 1998	External lighting	RM 250
January 1998	Additional airconditioning	RM 300
January 1998	Additional airconditioning	RM 250
March 1998	Balance of rental	RM 3,287
April 1998 to December 1999	Rental of RM20,820.00 for 21 months	RM 437,220
		RM441,307.40

The plaintiff through its solicitors by a letter of demand dated 9 November 1998 demanded the sum of RM441,307.40 from the defendant but the latter failed, neglected and refused to settle the said sum or any part thereof. For these reasons, the plaintiff claimed:

(a) the sum of RM441,307.40;

(b) interest at 8% per annum from 9 November 1998 until the date of realisation;

(c) costs; and

(d) such further and or other relief.

The stand of the defendant was that notwithstanding s. 8.02 of the tenancy agreement, the defendant had vacated the premises prematurely due to the continuous and persistent deterioration in its business at that rented premises during the period of its occupation. Prior to entering the tenancy agreement, the plaintiff made oral representations to the defendant in order to induce the latter to take up the premises by signing the tenancy agreement. These oral representations were in the following terms:

(1) that it was a catchment area for upper class customers bearing in mind that the defendant was involved in the business of selling "new lifestyle concept" furniture;

(2) high frequency of customers visiting the area;

(3) the plaintiff would hold from time to time in-house promotions and activities within the building of the rented premises for the benefit of its occupants; and

(4) an abundance of parking space at reasonably priced parking charges.

The stand of the defendant was quite simple. That the defendant had been induced by the plaintiff on the basis of those oral representations and relying on those oral representations the defendant had agreed to enter the tenancy agreement. Unfortunately, after a period of one year, the defendant to its detriment discovered that those oral representations were essentially incorrect and not true in these respects:

(1) that there were not many upper class customers patronising the building of the rented premises;

(2) heavy traffic congestion must have spurned off prospective customers from visiting the building of the rented premises;

(3) the plaintiff seldom or never conducted in-house promotions or activities for the benefit of its tenants; and

(4) there were insufficient parking spaces and those that were available were costly as it incurred high parking charges.

The defendant was certainly unhappy with the rented premises. It was to the detriment of the defendant when they decided to rent the premises. The oral representations by the plaintiff were instrumental in convincing the defendant to rent the premises. The defendant averred that the plaintiff had failed to take the following measures:

(1) to make a fair and proportionate assessment of the number of customers patronising the building of the rented premises;

(2) to foresee and forecast the approximate number of customers visiting the building of the rented premises;

(3) to carry out in-house promotions and various other activities in the building of the rented premises for the benefit of its tenants; and

(4) to make available ample parking spaces at reasonable parking charges.

The plaintiff focussed its attention to the breach of the tenancy agreement and sought by way of encl. 8 to obtain a summary judgment against the defendant under O. 14 of the Rules of the High Court 1980 ("RHC"). The senior assistant registrar ("SAR") heard the O. 14 application in encl. 8 on 23 July 1999 and dismissed it with costs. She too gave the defendant an unconditional leave to defend. Aggrieved by the decision of the SAR, the plaintiff filed an appeal to the judge-in-chambers as seen in encl. 13.

Mr. Francis I. Brigged, learned counsel for the plaintiff, contended that the defendant was liable to pay the rent for the unexpired duration of the tenancy agreement as spelt out in s. 8.02 (e) thereof. He submitted that the defendant had signed the tenancy agreement voluntarily and it was thus not open to the defendant to deny that they are liable to pay the amount due and outstanding. It was submitted that there was no suggestion of coercion or duress exerted on the defendant by the plaintiff when the tenancy agreement was signed. My attention was drawn to the case of *Teh Wan Sang & Sons Sdn Bhd v. See Teow Chuan* [1984] 1 MLJ 130, where Peh Swee Chin J (as he then was) discussed the question of the liability of the tenant to pay for the unexpired period of a fixed term of tenancy agreement. At p. 133 of the report, his Lordship Peh Swee Chin J (as he then was) said:

> Bearing in mind that the contract in this case was a three year tenancy and bearing in mind the *ratio* in the *Carter's* case above, it would seem that the breach arose when the landlord finally accepted the anticipatory repudiation, *ie*, when the landlord finally took in a new tenant as from May 16, 1977. The claim of the landlord for loss of rent up to May 15, 1977 is therefore valid and proper, and there was no need for the landlord to try to reduce the losses for which the tenant would be responsible.

and using this passage as a leverage, Mr. Francis I. Brigged argued that the *ratio decidendi* in *Teh Wan Sang & Sons Sdn Bhd v. See Teow Chuan (supra)* was incorporated in s. 8.02(e) of the tenancy agreement where it categorically stated that the tenant will be liable to pay the rent for the unexpired term of the tenancy and that the landlord will refund such rent it received from any

new tenant during the unexpired term to the tenant. But alas, when the defendant successfully located an interested tenant to operate "Restoran Rusia" at the rented premises, the plaintiff refused to accept the offer. It was further argued that the clear wording of s. 8.02(e) of the tenancy agreement coupled with the decision of *Teh Wan Sang & Sons Sdn Bhd v. See Teow Chuan (supra)* sealed the fate of the defendant in that it did not afford any defence to the defendant in regard to the plaintiff's claim at all. With respect, a correct appraisal of the case of *Teh Wan Sang & Sons Sdn Bhd v. See Teow Chuan (supra)* would indicate that that case focussed its attention on the question of mitigation of losses. There Peh Swee Chin J (as he then was) was of the view that the need or duty to mitigate one's losses can only arise if there was a breach of contract. There, unlike the present appeal, Peh Swee Chin J (as he then was) was not concerned with an O. 14 application.

By way of a rebuttal, Mr. Loo Chea Chin, learned counsel for the defendant, argued that at the time of signing the tenancy agreement, the defendant was informed by the plaintiff that the terms and conditions of the tenancy agreement were standard and were similar to the other tenants occupying the rented premises. Unfortunately, these representations were not counterchecked nor ascertained by the defendant to be true before the defendant signed the tenancy agreement. The defendant's sojourn at the rented premises was a disaster. Business was so bad that the defendant had to cease its operation. It was said that the defendant had invested an approximate sum of RM900,000 in the form of RM500,000 for furnishings and RM400,000 for stocks in trade. Sales were very poor and the defendant suffered losses to the tune of approximately RM277,404. To avoid further losses, the defendant had no choice but to cease business in January 1998.

As alluded to earlier, the plaintiff claimed in the statement of claim for the sum of RM441,307.40. By para. 8 of the affidavit of Khoo Boon Hoe as seen in encl. 7 which was deposed in support of the plaintiff's application in encl. 8 for summary judgment, the figure claimed was inflated to read RM441,561.60. There was thus an inconsistency in regard to the particulars of the amount claimed in the statement of claim with that of the affidavit in encl. 7. Why was there such an inconsistency? Why must the plaintiff sought for summary judgment in spite of that kind of inconsistency? These two questions can only be answered at the trial proper and not by way of an affidavit evidence.

Three main issues were raised in the course of the arguments, and I shall refer to them, in due course, not in its order of priority. There were other

insignificant issues which were raised but not adverted to in this judgment and I shall not dwell on them at all.

Delay In Filing The O. 14 Application

Was there indeed an inordinate and unexplained delay? The writ of summons together with the statement of claim in encl. 1 were filed on 19 February 1999. The memorandum of appearance filed by the defendant was on 26 March 1999 as seen in encl. 2. The statement of defence and the counterclaim in encl. 6 were filed on 23 April 1999. The reply to the statement of defence and the defence to the counterclaim were filed on 5 May 1999 as seen in encl. 5. The O. 14 application in encl. 8 was filed on 17 May 1999. Between the period from the filing of the memorandum of appearance to the period wherein the O. 14 application was filed, it was approximately one month 21 days. The delay was explained in the affidavit of Khoo Boon Hoe as seen in encl. 7 of paras. 12 and 13 thereof; and the reasons advanced were that:

(1) the plaintiff wanted to file a reply to the defence before filing the O. 14 application;

(2) the plaintiff needed time to investigate the allegations in the statement of defence and the counterclaim in encl. 6; and

(3) the delay did not prejudice the defendant.

The Court of Appeal had occasion to consider the issue of whether the delay in filing an application for summary judgment under O. 14 would be a valid ground for dismissal of that application in the case of *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1998] 1 CLJ 424. At p. 429 of the report, Gopal Sri Ram JCA had this to say:

> When properly understood, there is nothing in *Ng Hee Thoong's* case to suggest that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court. Such a proposition runs counter to the interests of justice. For delay can surely provide no answer to an application made under Order 14 where there are no *bona fide* triable issues. We therefore take this opportunity to declare the absence of the proposition contended for by counsel.

NH Chan JCA echoed the same sentiment when he said at p. 430 of the report:

> Delay in applying for Order 14 is no ground for defeating the plaintiff's right to summary judgment under Order 14 when there is no real defence disclosed.

Applying these principles of law to the facts of the present appeal, the delay was of no significance at all. Moreover, that delay had been accounted for and explained.

Were there *bona fide* triable issues in the present appeal? Was a real defence disclosed by the defendant? These would be the germane questions to raise and it would certainly decide the fate of the present appeal.

Oral Representations

This would be governed by s. 92(b) of the Evidence Act 1950 which enacts as follows (the relevant portions only):

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of an oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:
>
> Provided that –
>
> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document.

Mohd Yusoff bin Mohamed SCJ in *Eushun Properties Sdn Bhd & Ors v. MBf Finance Bhd (formerly known as Malaysia Borneo Finance Corpn (M) Bhd)* [1992] 3 CLJ 1519 examined in great detail the ramifications of s. 92 of the Evidence Act 1950. At p. 1521 of the report, this was what his Lordship said:

> It is also our view that s. 92 of the Evidence Act does not absolutely bar the defendants from adducing evidence to vary the terms of formal agreement between parties. As asserted in the affidavits of the defendants there had been negotiations between Kung Beng Hung, the previous General Manager of the plaintiff on the purpose of the loan and the intent of the initial drawdown of the $1.5 million on a quarterly basis. It is also averred by the defendant that when their true arrangement was not reflected in the agreement the defendants had raised certain queries and assurances were given by Kung to them.
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> These averments are questions of fact which cannot be determined on affidavit evidence alone. As demonstrated in the following authorities, evidence of surrounding circumstances and factual background are admissible, and that collateral agreement can exist side by side with the main agreement which it contradicts.

Continuing at the same page and spilling over to p. 1522 of the report, his Lordship said:

> The law on collateral oral agreement is clearly spelt out in s. 92 (b) of the Evidence Act. It is recognised as one of the exceptions to the general rule

> forbidding extrinsic evidence to be adduced to contradict, vary, add to or subtract from, the terms of an agreement which had been reduced into the form of a document.

Phipson on Evidence, 14th edn, (1990) at p. 1011, para. 37-01 categorically states that extrinsic evidence is inadmissible to contradict, vary, add to or subtract from the terms of the written agreement. The rationale for this principle is simple. It is this: that where parties have on their own free will put their mutual engagements in writing, it is only reasonable to presume that they have reflected and introduced into the written agreement every conceivable material term and circumstances.

There are six provisos to s. 92 of the Evidence Act 1950, and for this exercise proviso (b), which had been reproduced earlier, would be of crucial importance. In every sense of the word, a collateral agreement must be a complete legal contract, and the effect must surely be to contradict, vary, add to or subtract from the terms of the written agreement. Lord Moulton in *Heilbut, Symons & Co. v. Buckleton* [1913] AC 30 at 47 aptly said that:

> Such collateral contracts are viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts, unquestionably entered into by them, and more especially would have effect of lessening the authority of written contracts by making it possible to vary by suggesting the existence of verbal collateral agreement relating to the same subject matter.

One thing is certain. Oral evidence is certainly admissible and would be confined to collateral matters on which the document is totally silent. (*Nagendra Nandini Dasi v. Bhola Nath Khamaru* 65 CLJ 225). When a document in writing does not contain the entire agreement but embodies only some of the conditions, oral evidence to prove some other terms agreed upon and not inconsistent with the written instrument is clearly admissible (*Balaram v. Ramesh A* [1973] Or 13). The phrase "separate oral agreement" appearing in s. 92 (b) of the Evidence Act 1950 obviously refer to contemporaneous or prior oral agreement. In my considered view, proviso (b) requires that:

(a) the separate agreement should relate to any matter on which the document is silent: and

(b) that it is not inconsistent with its terms.

It must be emphasised that the rule in s. 92 of the Evidence Act 1950 is intended to apply to contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document – all these

which have been formally and carefully drawn up and which may therefore be presumed to contain all that the parties intended to be their terms and conditions. *Lindley v. Lacey* 34 LJCP; *Kunja Behari v. Raman* 41 CWN 1953; and *Morgan v. Griffith* LR 6 Ex 71 lay down a sound rule worth repeating. Those cases say that the rule in s. 92 of the Evidence Act 1950 does not prevent parties to a written contract from proving that they, either contemporaneously or as a preliminary measure, have entered into a distinct oral agreement on some collateral matter. Thus, letters exchanged between the parties during negotiations which culminated in a written agreement are certainly admissible to support a collateral verbal agreement raised by one of the parties (*Pearson v. Pearson* 54 LJ Ch 37). Another factual scenario would be this. A tenant entering into a tenancy agreement in respect of an unfinished house with the landlord is not precluded from proving that at the time of the negotiations, the landlord agreed to put the unfinished house into a habitable state (*Mann v. Mann* 43 LJCP 241). In a mortgagor-mortgagee situation, the mortgagee can introduce evidence of an oral nature to show that the mortgagee agreed to take the mortgaged lands in full satisfaction of his dues when the mortgage deed is totally silent as to the mode and schedule of payment (*Kunja Behari v. Raman (supra)* and *Lakshminarasimha v. Raghavamma* A 1936 M 380). Sometimes a document is so vague that it may be construed as a mere acknowledgment of the intention of the parties in regard to a debt existing and persisting to exist between the parties. In such a situation, oral evidence as to the terms and conditions of the loan and the rate of interest agreed by the parties should be allowed (*Brij Krishore v. Lakhan* A 1978 A 314). Again, when a promisorry note was totally silent in regard to the interest leviable, the court in *Saudamini v. Spalding* 12 CLR 163 allowed the admission of an oral and subsequent agreement to pay interest to be alluded to and adduced as evidence. Stephenson LJ in *Arrale v. Costain Civil Engineer* [1976] 1 Lloyd's Rep 98 was bold enough to suggest that evidence of negotiations could be admitted in order to clarify existing ambiguities. Kerr J followed the cue set by Stephenson LJ and his Lordship Kerr J in *The 'Karen Olthmann'* [1976] 2 Lloyd's Rep 708 aptly said:

> If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is being alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the word as the result of their common intention.

In the present appeal, the oral representations by the plaintiff should be admitted as it clearly showed that the defendant was induced to enter the tenancy agreement. The admission of the extrinsic evidence by way of oral

representations were not inconsistent with the main terms of the tenancy agreement and accordingly it fell squarely within the ambit and purview of proviso (b) to s. 92 of the Evidence Act 1950. Mohd Yusoff bin Mohamed SCJ in *Eushun Properties Sdn Bhd & 4 Ors (supra)* referred to the case of *Esso Petroleum Co. Ltd v. Mardon* [1976] 1 QB 801 in deliberating the issue of s. 92 of the Evidence Act 1950. The facts of *Esso Petroleum Co. Ltd v. Mardon (supra)* may be stated as follows. In 1961, the plaintiffs' employee, with forty (40) years experience, calculated that the potential throughput of a petrol station was likely to reach 200,000 gallons by the third year of operation of the station. The local planning authority refused permission for the pumps to front onto the street so they had to be placed at the back of the site. In 1963, the defendant, a prospective tenant for the petrol station, was given the same estimate of throughput by the plaintiffs' employee. The defendant suggested that 100,000 or 150,000 gallons was a more likely figure, but his doubts were quelled by his trust in the greater experience of the plaintiffs' employee. The defendant entered into a three-year tenancy. In the first 15 months the throughput was only 78,000 gallons. The losses continued, and eventually the plaintiffs cut off the defendant's supply of petrol because of non-payment. They sought possession of the station and moneys they were owed. The defendant claimed damages, *inter alia*, for breach of warranty as to the potential throughput of the station. It was held that the statement was a contractual warranty because it was a factual statement on a crucial matter by a party professing to have special knowledge in order to induce the defendant to enter into the contract. The court also held that the warranty was not a promise that the station would in fact have this throughput but a warranty that the forecast had been made with reasonable care and skill. The court too held that the plaintiffs were liable in damages for the amount that the defendant had lost by being induced to enter into the contract. Lord Denning MR, at p. 817 to p. 818 of the report, had this to say:

> Collateral warranty
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> Ever since *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30, we have had to contend with the law as laid down by the House of Lords that an innocent misrepresentation gives no right to damages. In order to escape from that rule, the pleader used to allege – I often did it myself – that the misrepresentation was fraudulent, or alternatively a collateral warranty. At the trial we nearly always succeeded on collateral warranty. We had to reckon, of course, with the dictum of Lord Moulton, at p. 47, that 'such collateral contracts must from their very nature be rare.' But more often than not the court elevated the innocent misrepresentation into a collateral warranty: and thereby did justice – in advance of the Misrepresentation Act 1967. I remember scores of cases of that kind, especially on the sale of a business. A representation as to the profits that had been made in the past was invariably held to be a warranty. Besides

that experience, there have been many cases since I have sat in this court where we have readily held a representation – which induces a person to enter into a contract – to be a warranty sounding in damages. I summarised them in *Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd.* [1965] 1 W.L.R. 623, 627, when I said:

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it, by entering into the contract, that is *prima facie* ground for inferring that it was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that it was intended to be acted upon and was in fact acted on.

Mr. Ross-Munro, retaliated, however, by citing *Bisset v. Wilkinson* [1927] A.C. 177, where the Privy Council said that a statement by a New Zealand farmer that an area of land 'would carry 2,000 sheep' was only an expression of opinion. He submitted that the forecast here of 200,000 gallons was an expression of opinion and not a statement of fact: and that it could not be interpreted as a warranty or promise.

Now I would quite agree with Mr. Ross-Munro that it was not a warranty – in this sense – that it did not guarantee that the throughput would be 200,000 gallons. But, nevertheless, it was a forecast made by a party - Esso – who had special knowledge and skill. It was the yardstick (the e.a.c.) by which they measured the worth of a filling station. They knew the facts. They knew the traffic in the town. They knew the throughput of comparable stations. They had much experience and expertise at their disposal. They were in a much better position than Mr. Mardon to make a forecast. It seems to me that if such a person makes a forecast, intending that the other should act upon it – and he does act upon it, it can well be interpreted as a warranty that the forecast is sound and reliable in the sense that they made it with reasonable care and skill. It is just as if Esso said to Mr. Mardon: 'Our forecast of throughput is 200,000 gallons. You can rely upon it as being a sound forecast of what the service station should do. The rent is calculated on that footing.' If the forecast turned out to be an unsound forecast such as no person of skill or experience should have made, there is a breach of warranty. Just as there is a breach of warranty when a forecast is made - 'expected to load' by a certain date – if the maker has no reasonable grounds for it: see *Samuel Sanday and Co. v. Keighley, Maxted and Co.* [1922] 27 Com. Cas. 296; or bunkers 'expected 600/700 tons': see *Efploia Shipping Corporation Ltd. v. Canadian Transport Co.Ltd. (The Pantanassa)* [1958] 2 Lloyd's Rep 449, 455-457 by Diplock J. It is very different from the New Zealand case where the land had never been used as a sheep farm and both parties were equally able to form an opinion as to its carrying capacity: see particularly *Bisset v. Wilkinson* [1927] A.C. 177, 183-184.

In the present case it seems to me that there was a warranty that the forecast was sound, that is, Esso made it with reasonable care and skill. That warranty

was broken. Most negligently Esso made a 'fatal error' in the forecast they stated to Mr. Mardon, and on which he took the tenancy. For this they are liable to damages. The judge, however, declined to find a warranty. So I must go further.

At p. 820 of the report, Lord Denning M.R. in serious vein said:

That seems to me right. A professional man may give advice under a contract for reward; or without a contract, in pursuance of a voluntary assumption of responsibility, gratuitously without reward. In either case he is under one and the same duty to use reasonable care: see *Cassidy v. Ministry of Health* [1951] 2 KB 343, 359-360. In the one case it is by reason of a term implied by law. In the other, it is by reason of a duty imposed by law. For a breach of that duty he is liable in damages: and those damages should be, and are, the same, whether he is sued in contract or in tort.

It follows that I cannot accept Mr. Ross Munro's proposition. It seems to me that *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465, properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another – be it advice, information or opinion – with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages. This proposition is in line with what I said in *Candler v. Crane, Christmas & Co.* [1951] 2 KB 164, 179-180, which was approved by the majority of the Privy Council in *Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt* [1971] AC 793. And the judges of the Commonwealth have shown themselves quite ready to apply *Hedley Byrne* [1964] AC 465, between contracting parties: see in *Canada, Sealand of the Pacific Ltd. v. Ocean Cement Ltd.* [1973] 33 D.L.R. (3d) 625; and in *New Zealand, Capital Motors Ltd. v. Beecham* [1975] 1 N.Z.L.R. 576.

Applying this principle, it is plain that Esso professed to have – and did in fact have – special knowledge or skill in estimating the throughput of a filling station. They made the representation – they forecast a throughput of 200,000 gallons – intending to induce Mr. Mardon to enter into a tenancy on the faith of it. They made it negligently. It was a 'fatal error.' And thereby induced Mr. Mardon to enter into a contract of tenancy that was disastrous to him. For this misrepresentation they are liable in damages.

On the measure of damages, Lord Denning MR had this to say at p. 820 spilling over to p. 821 of the report:

The measure of damages

Mr. Mardon is not to be compensated here for 'loss of a bargain.' He was given no bargain that the throughput would amount to 200,000 gallons a year. He is only to be compensated for having been induced to enter into a contract which turned out to be disastrous for him. Whether it be called breach of warranty or negligent misrepresentation, its effect was not to warrant the throughput, but only to induce him to enter the contract. So the damages in either case are to be measured by the loss he suffered. Just as in *Doyle v. Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158, 167 he can say:

… I would not have entered into this contract at all but for your representation. Owing to it, I have lost all the capital I put into it. I also incurred a large overdraft. I have spent four years of my life in wasted endeavour without reward: and it will take me some time to re-establish myself.

For all such loss he is entitled to recover damages. It is to be measured in a similar way as the loss due to a personal injury. You should look into the future so as to forecast what would have been likely to happen if he had never entered into this contract: and contrast it with his position as it is now as a result of entering into it. The future is necessarily problematical and can only be a rough-and-ready estimate. But it must be done in assessing the loss.

In *Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd* [1965] 2 All ER 65 CA, the facts were quite interesting. There the plaintiff asked the defendants, who were car dealers, to find him a "well vetted" Bentley car. A car was soon found. The defendants informed the plaintiff that they were in a position to find out the history of cars and this car had been fitted with a replacement engine and gearbox and had done only 20,000 miles since then. The defendants relied on the odometer reading and had conveniently not checked the details meticulously. The plaintiff bought the car and discovered that this representation as to the mileage was untrue. The plaintiff then sued the defendants seeking damages for breach of contract. It was held that the statement amounted to a warranty, and therefore the plaintiff was entitled to damages. Lord Denning M.R. had this to say:

The first point is whether this representation, namely that the car had done twenty thousand miles only since it had been fitted with a replacement engine and gearbox, was an innocent misrepresentation (which does not give rise to damages), or whether it was a warranty. It was said by Holt CJ and repeated in *Heilbut, Symons & Co. v. Buckleton* [1913] AC 30:

> An affirmation at the time of the sale is a warranty, provided it appears on evidence to be so intended.

But that word 'intended' has given rise to difficulties. I endeavoured to explain in *Oscar Chess, Ltd v. Williams* [1957] 1 All ER 325 that the question whether a warranty was intended depends on the conduct of the parties, on their words

and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice. What conduct, then? What words and behaviour, lead to the inference of a warranty?

Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it. In the *Oscar Chess* case the inference was rebutted. There a man had bought a second hand car and received with it a log-book, which stated the year of the car, 1948. He afterwards resold the car. When he resold it he simply repeated what was in the log-book and passed it on to the buyer. He honestly believed on reasonable grounds that it was true. He was completely innocent of any fault. There was no warranty by him but only an innocent misrepresentation. Whereas in the present case it is very different. The inference is not rebutted. Here we have a dealer, Mr. Smith, who was in a position to know, or at least to find out, the history of the car. He could get it by writing to the makers. He did not do so. Indeed it was done later. When the history of this car was examined, his statement turned out to be quite wrong. He ought to have known better. There was no reasonable foundation for it.

Raja Azlan Shah CJ (Malaya) (as His Majesty then was) had occasion to consider the issue of collateral oral contract in the case of *Tan Swee Hoe Co. Ltd v. Ali Hussain Bros* [1980] 2 MLJ 16 FC. At p. 18 of the report, his Majesty had this to say:

In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts. The classic statement on collateral contract was made by Lord Moulton in *Heilbut Symons & Co. v. Buckleton* [1913] A.C. 30, 47. "It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you hundred pounds', is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract." The case of *City and Westminster Properties (1934) Ltd v. Mudd* [1959] Ch 129 and the subsequent applications of it has, in our opinion, fortified this not unfamiliar doctrine. We think Lord Denning M.R. summarised it in *Dick Bentley Productions, Ltd. v. Harold Smith (Motors), Ltd.* [1965] 2 All ER 65, 67: 'Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the

> very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.

After examining the latest authorities on the subject matter, his Majesty in fine language concluded (see p. 19 of the report) as follows:

> In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

The oral representations made in the course of negotiations between the parties must be received in evidence. Those oral representations must have induced the defendant to act and the defendant did act on it when the defendant entered into that tenancy agreement. *Prima facie* those representations, applying the speech of Lord Denning MR in *Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd (supra)*, must be construed as representations that were intended by the plaintiff to be a warranty. Mr. Loo Chea Chin, learned counsel for the defendant, rightly submitted that it would lead to great mischief in the law and certainly would not be in the interest of business efficacy if representations made by the plaintiff could not be relied upon by the defendant. The case of *Tan Chong & Sons Motor Company (Sdn) Berhad v. Alan McKnight* [1983] 1 MLJ 220 was cited as an authority for that proposition. That was a case where Alan McKnight purchased a Datsun 260C automatic station wagon from Tan Chong and the representative of Tan Chong had expressly warranted that the Datsun motorcar would comply with and meet all the requirements of the Australian Design Rules (ADR). The representations amounted to an implied warranty that the Datsun motorcar complied with the ADR. At the High Court, Gunn Chit Tuan J (as he then was) accepted the evidence of Alan McKnight and found that there was such a warranty and Tan Chong had breached that warranty and his Lordship then awarded general damages. On appeal by Tan Chong, the parties argued on the legal issues of liability and quantum and Salleh Abas FJ (as he then was) examined the law at p. 227 to p. 228 of the report in explicit terms. This was what his Lordship said:

> As to the issue of liability the first question to ask in this case is this: Was there a warranty and, if so, was it breached?
>
> The word "warranty" in the law of Contract tends to be confusing as it may relate to a term of a contract, or to a separate enforceable promise which is collateral to a contract. (See *Anson's* 24th ed. pp. 125-129). Insofar as the word

is used to denote a term of a contract, its employment is purely for the purpose of distinguishing the most important terms (known as conditions) from the less important ones (known as warranty), the breaches of which lead to different results and give different remedies to the innocent party. If the term breached is a condition, the innocent party has the right to repudiate the contract and consider himself discharged therefrom and claim damages for the breach. If on the other hand the term broken is only a warranty the innocent party cannot repudiate the contract and his remedy is confined to the claim for damages only. In the case of a breach of a condition it is of course open to the innocent party to treat the matter as a breach of warranty and sue for the damages only without having to repudiate the contract.

The other context in which the word 'warranty' is used in the law of Contract is a separate pre-contract statement on the basis of which parties subsequently entered into a contract. Such pre-contract statements are binding and enforceable as a collateral warranty. It is referred to as collateral because it is external and subsidiary to the main contract, *Erskine v. Adeane* [1873] 8 Ch. App. 756; *De Lassalle v. Guildford* [1901] 2 KB 215.

It is in the context of a collateral warranty that the respondent found his cause of action in this case, although he referred to it in paragraph 5 of his statement of claim as an 'express' warranty. We attach no legal significance to the word 'express' here other than indicating or referring to the manner in which the warranty was communicated or expressed to the respondent. It was expressed by words of mouth and by conduct of Mr. Sze.

For the purpose of determining whether these words and conduct amount to a warranty enforceable at the suit of the respondent, we can do no better than be guided by the test laid down by Lord Denning, M.R. in *Dick Bentley Productions Ltd. & Anor. v. Harold Smith (Motors) Ltd* [1965] 2 All ER 65, 67 a test which he had followed and applied in subsequent cases. The test is this:

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it.

One of the ways to rebut this *prima facie* inference is for the maker of the representation to show that he honestly believed on reasonable grounds that it

was true. *Chess (Oscar) Ltd. v. Williams* [1957] 1 All ER 325 and *Heilbut, Symons & Co. v. Buckleton* [1913] AC 30, 47.

Bluntly put, the oral representations made by the plaintiff's representative would certainly bar the plaintiff from obtaining summary judgment against the defendant. Those oral representations can only be determined by *viva voce* evidence at the trial of the action. Those oral representations too established beyond per adventure that there was indeed a *bona fide* triable issue that ought to be determined not by affidavit evidence but rather by way of a trial where the assessment of the credibility of the witnesses would be seen and heard in open court. Ong CJ (Malaya) in *Kim Seng Hotel And Coffee Shop v. Chuah Teong Buan* [1971] 1 MLJ 233 FC, in the same context had this to say:

> When the issue is thus stated, I think it is reasonably clear that there is a *bona fide* triable issue to be determined, not merely by the perusal of evidence on affidavits, but also requiring assessment of the credibility of witnesses to be seen and heard by the trial judge in open court. The question of fact is: what was the agreement involving payment of the $20,000? Facts are so infinite in their variety that, in my view, precedents can be of little or no real assistance in this case. Should it be held, in favour of the respondent, that the payment was by way of premium, then a finding of fact to that effect will naturally dispose of the matter. On the other hand, it cannot be ruled out that possibly the appellant, by himself or with the support of credible witnesses, may be able to persuade the trial judge to hold that there was a promise given by the respondent not to interrupt or disturb his tenant in the peaceful enjoyment of the premises so long as he observed all the terms and conditions of his tenancy, including the prompt payment of rent. If so, then and only then other questions will arise for further determination, whether or not equity will 'stretch out a merciful hand' to assist the tenant who had expended no small sum on the faith of a promise that he will be left in undisturbed possession: see *Hughes v. Metropolitan Railway Co.* [1877] 2 App. Cas 439, 448 and *D. & C. Builders v. Rees* [1966] 2 QB 617, 624.

Proceeding in the same vein, Abdul Hamid CJ (Malaya) in *Ganesan & Anor v. Baskaran* [1986] 2 MLJ 26 SC, particularly at p. 29 of the report had this to say:

> In view of the foregoing, the central question that arises for determination is whether the respondent did orally promise that he would obtain the consent of the Ruler-in-Council necessary for the transfer. Clause 6(b) of the agreement which seems to support the appellants' allegation, at any rate, appears consistent with their contention that there was the question of the respondent's oral promise which called for determination. And if the respondent did give the oral promise, the further question that called for determination was whether it was a term or condition precedent. In law therefore, there is an issue to be tried.

Continuing in the same tempo, his Lordship Abdul Hamid CJ (Malaya), in fine style, said at p. 29 to p. 30 of the report:

> The further question that calls for our consideration is whether evidence of oral undertaking is relevant and admissible. The learned Judge referred to clause 6(b) of the agreement and formed the view that evidence relating to oral agreement would per se contradict and vary the unambiguous term of clauses 2, 5 and 6. With respect we disagree. Such a finding cannot in the light of proviso (c) to section 92 of the Evidence Act be upheld. The proviso reads –
>
> (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.
>
> Basically, it is the appellants' contention that there was a separate oral agreement which constituted a condition precedent in that it imposed an obligation upon the respondent under the agreement, namely, to obtain the approval of the Ruler-in-Council for a transfer. It is the appellants' further contention that evidence of separate oral agreement is clearly admissible under proviso (c) of section 92 of the Evidence Act. We are constrained to say there is merit in the argument. Proviso (c) of section 92 of the Evidence Act clearly provides that the existence of an oral undertaking may be proved. It may well be that the onus is on the appellants to prove the existence of such an oral undertaking, but that is hardly the point. What matters is that clearly the appellants were permitted in law to adduce evidence to prove the existence of such a promise. And in the event of a finding that there was such an oral undertaking that emanated from the respondent, the appellants, having entered into the agreement on the strength of such a promise, were entitled to rely on that promise. (See *City and Westminster Properties (1934) Ltd. v. Mudd* [1959] 1 Ch. 129).
>
> It is our judgment therefore that there were issues which must be resolved at the trial. These issues are either of law or fact or both and certainly are not matters which can be decided on affidavit evidence.

All these authorities when blended with the facts of the present appeal would show that this was not a suitable case for an O. 14 application. Indeed there were *bona fide* triable issues in the present appeal and the defendant had succeeded in disclosing a real defence. This was my judgment and I so hold accordingly.

It must be recalled that the defendant had strictly pleaded the relevant facts to bring it within and into sharp focus proviso (b) to s. 92 of the Evidence Act 1950 (*ML Samuel v. Bhadur Singh alias Bahadur Singh* [1938] MLJ 173, 174; *Ho Shee Jan v. Hadayat Harta Holdings Sdn Bhd* [1989] 1 MLJ 33 SC; and *Sigma Cable Co Ltd v. Nam Huat Electric & Sanitary Co and Ors* [1972] 1 MLJ 7). The relevant facts too were also adverted to and raised in the affidavits and I must give effect to them accordingly.

Unconditional Leave To Defend And The Counterclaim

The SAR rightly gave the defendant an unconditional leave to defend. The cases of *Saw v. Hakim* 5 TLR 72; *Ironclad, etc, Co v. Gardner* 4 TLR 18; *Ward v. Plumbley* 5 TLR 198; *Yorkshire Banking Co. v. Beatson* 4 C.P.D. 213; and *Ray v. Barker* 4 Ex D 279 – lay down a simple proposition of law beneficial to the defendant. Those cases say that where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence, the defendant ought to be given leave to defend. And according to the case of *Ward v. Plumbley* 6 TLR 198, where the defendant has shown "a fair probability of a defence", an unconditional leave to defend ought to be given.

In the present appeal, there was a serious conflict as to the law, and that being the case the O. 14 application should not be acceded to (*Crawford v. Gilmore* 30 L.R. Ir. 238; and *Electric & General Contract Corporation v. Thomson-Houston, etc, Co.* 10 TLR 103). The defendant should not be shut out without a trial. The defendant should have their say in court.

The counterclaim advanced by the defendant should entitle the defendant to be given an unconditional leave to defend. That counterclaim arose out of the same subject matter of the action (*Morgan & Son Ltd v. S. Martin Johnson & Co* [1949] 1 KB 107 CA; *Hanak v. Green* [1958] 2 QB 9, CA; and *Bankes v. Jarvis* [1903] 1 KB 549). The counterclaim for the return of the rental security deposit and service charge amounting to RM82,185 should be adjudicated in open court. This was my judgment and I so hold accordingly.

Conclusion

For these varied reason, I upheld the decision of the SAR. The appeal in encl. 13 should be dismissed with costs.